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ABSTRACT

Truth in testing, competency testing, and intelligence tests constitute the central topics of this newsletter. The authors review a report prepared by the Education Commission of the States on truth-in-testing legislation and litigation, covering recent efforts at the state and federal levels to open the testing process to public scrutiny. They then describe a recent suit over fair treatment of handicapped students in competency testing programs, before discussing the Hoffman v. N.Y.C. Board of Education decision on competency testing and educational malpractice. Finally, the document examines the opinion of a federal district court in Larry P. v. Riles with respect to racial bias in intelligence tests, federal statutory law, and legal standards for test validation. (RW)

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ECS Education Commission of the States
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FOOTNOTES

No. 2 February 1980

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14 The Carnegie Corporation of New York has awarded the ECS Law and Education Center a two-year grant. The Carnegie grant thus supplements the three-year seminal grant provided by the Spencer Foundation. The Carnegie grant will enable LEC to hire additional staff and to expand into additional specialty areas. Details on staff and specialty areas will be included in a subsequent issue of *Footnotes*.

15 The *Clearinghouse Project* mentioned in Footnote 1 (*Footnotes*, November 1979) is now operational. As noted in Footnote 1, the primary purpose of the ECS Law and Education Center (LEC) is to provide research and preventive legal assistance in a limited number of specialty areas, but LEC is also developing this clearinghouse capacity to provide ECS constituents with education law materials in over 90 other areas of interest to states.

The Clearinghouse subject-areas range from ability grouping to zoning, and include areas such as educational malpractice, bilingual education, compulsory attendance, copyright, desegregation, Indian education, legal education, privacy, private schools, school board authority, school finance, sex equity, special education, student records, student rights,

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Education Commission of the States

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teachers, testing (competency, open v. secure, IQ, general), Title I, and vocational education. We do not have the resources to collect and disseminate all kinds of law materials (for example, litigation papers) and therefore the Clearinghouse, at least initially, will focus on three kinds of information for each of the subject-areas: (1) summaries of federal and state cases; (2) listing of law review articles and other legal periodicals; and (3) federal statutes, regulations and policy statements. Our goal is to collect and develop sufficient materials of this kind to enable ECS constituents to acquire (1) basic legal information and (2) references to more detailed legal sources for each subject-area.

This Clearinghouse is not intended to duplicate or supplant other kinds of legal and general information that have been disseminated in the past by the ECS Department of Research and Information directed by Russ Vlaanderen. The Department of Research and Information, for example, will continue to collect and disseminate information about developments in *state* laws that affect education.

The LEC Clearinghouse is funded in part by ECS state fees and is designed for ECS constituents (state boards and departments of education, governors, and legislators and their respective staffs). Therefore these *ECS constituents can utilize the LEC Clearinghouse free of charge*. We do not have the resources to provide this service free of charge to other interested persons or organizations, but we will try to respond to all requests that are accompanied by a prepaid $10 service charge for each subject-area request. This payment will be returned if we (1) do not have time to process the request or (2) determine that we do not have relevant materials.

All requests for Clearinghouse materials should be addressed to Ms. Chris Char, Legal Secretary/Administrative Assistant, ECS Law and Education Center, 1860 Lincoln Street, Denver, CO 80295.

16 ECS recently published an 89-page *report on truth-in-testing* entitled "Searching for the Truth About 'Truth-In-Testing' Legislation." Funded by a grant from the Ford Foundation, this report was prepared pursuant to an ECS Commissioners' resolution that ECS "undertake a study of the intent and implications of recent state actions and legislation pending in Congress to open the testing process to public scrutiny." The principle author of the report is Rexford Brown, Director of Publications and User Products, National Assessment of Educational Progress (NAEP). As noted in the executive summary, "The report is not a policy statement; rather, it is intended to provide enough background to prepare legislators confronting the issue for the major points they can expect to see raised in discussions and hearings."

"At the center of the debate," the executive summary continues, "are two contending definitions of 'fairness.' On the one side are the proponents of disclosure legislation, who argue that as a matter of simple fairness, students should be able to see the test instrument (including the questions, the answers, and related test data) used to make important decisions about their lives. Proponents feel that tests are social policy instruments that should, in a democratic society, be open to scrutiny. On the other side, the opponents of legislation argue that test security insures fairness, so disclosure of the tests will, by breaching security, affect the validity of the tests, increase the costs and lessen confidence in standardized tests, all of which will erode fairness in decisions made about students. They feel that secure standardized tests give everyone an equal chance, and are more democratic instruments for policy making than are alternatives that permit the intrusion of various biases."

Time contributed by the ECS Law and Education Center enabled its director to prepare a chapter on the legal implications of open-testing legislation. Legal implications are considered under the following headings: (1) Legal Background, (2) Tenth Amendment, (3) First Amendment, (4) Due Process, (5) Copyright Act, (6) Extraterritorial Issues, (7) Freedom of Information and (8) Other Implications. The legal chapter concludes, "A tentative conclusion . . . is that open-testing legislation is not prohibited by existing constitutional and statutory law. One exception to this general conclusion might rest upon the copyright claim, as exemplified by the AAMC case [*American Association of Medical Colleges v. Carey*, C.A. No. 79-CV-730 (U.S. Dist. Ct., N.D.N.Y., complaint filed 11/9/79, preliminary injunction granted 1/21/80)]. While not challenging the authority of a state to enact open-testing legislation, the CEEB case [*College Entrance Examination Board v. Abrams*, No. 60880 (Sup. Ct. N.Y., complaint filed 1/18/80)] should clarify the extraterritorial extent of that authority. Legal counsel to state legislatures will want to review the arguments as refined in forthcoming legal briefs in these cases, and with reference to the specific legal and factual situations in their states. Some states may want to delay consideration of open-testing legislation until the legal parameters of their authority are clarified by decisions in these cases."

The report has been disseminated free of charge to primary ECS constituents. Copies of the report are available from the ECS Publications Department, 1860 Lincoln Street, Denver, CO 80295 ($6.50 per copy).

17 Fair and legal treatment of *handicapped students in diploma-based competency testing programs* continues to be a perplexing issue. Some of the issues are underscored by litigation in New York where the school board of the Northport-East Northport Union Free School District decided to award high school diplomas to two handicapped students who had met the requirements of the individualized education programs (IEP) called for by the Education for All Handicapped Children Act of 1975 (EHA), but had not taken the state-required competency test. The board's action was based on the belief that denial of diplomas would (1) violate federal and state laws related to pupils with handicapping conditions by depriving them of opportunities and benefits available to other students, and (2) be unfair because these students' disabilities prevent them from passing the state-required competency test "no matter how hard they try." The board therefore took legal action to enjoin enforcement of an order by the New York Commissioner of Education to reveal the names of the students who were given diplomas without taking the competency test. The board was successful in securing a preliminary injunction against the state. *Northport-East Northport School Dist. v. Ambach*, No. 7149-79 (N.Y. Sup. Ct., Albany County, preliminary injunction 9/18/79). No trial date has been set as of this writing.

Comment: In an article entitled "Competency Testing and Handicapped Students," 11 *Clearinghouse Review* 922 (March 1978), McClung and Pullin consider the fairness and legality of competency testing programs for handicapped children by discussing (1) exemptions, (2) different diplomas and standards, (3) different assessment procedures and (4) individual determinations. If handicapped students are exempted from competency testing programs, the authors recommend that they be given the option of taking the test if they so decide. The widely varying needs of handicapped children, the complexity of the issues, and potentially conflicting requirements of the EHA, Section 504 of the Rehabilitation Act of 1973 and the equal protection clause of the Fourteenth Amendment lead the authors to suggest that decisions about the nature and extent of participation of handicapped students in any competency testing program should be made on an individual basis as part of the IEP process required by the EHA.

18 The New York State Court of Appeals reversed an "educational malpractice" decision, *Hoffman v. N.Y.C. Board of Education*, 410 N.Y.S. 2d 99 (1978), awarding $500,000 to a student of normal or above normal intelligence who had been misclassified and miseducated as mentally retarded. The lower court had reduced the New York City jury verdict from $750,000 to $500,000, but distinguished the *Donohue* and *Peter W.* cases, *infra*, and let the verdict stand. The Court of Appeals, however, in a 4-3 decision dismissed Hoffman's case on grounds that as a matter of public policy such cases should not be entertained by New York courts. The majority stated that courts are not the proper forum to second guess the professional judgment of educators, and that Hoffman should have sought a remedy from the New York State Commissioner of Education.

Comment: *Hoffman* and other educational malpractice cases have implications for competency testing programs. Educators often express a Catch-22 concern that they may be sued *whether or not* they give a functionally illiterate student a high school diploma. Denying a diploma may lead to *Debra P.* type litigation [see *Debra P. v. Turlington*, 474 F. Supp. 244 (M.D. Fla. 1979)], they contend, while granting a diploma may lead to *Peter W.* type litigation. In *Peter W. v. San Francisco Unified School District*, 60 Cal. App.3d 814 (1976), a functionally illiterate high school graduate failed in his $1 million educational malpractice claim against the public high school that had presumably provided him with an inadequate education. See also *Donohue v. Copiague Union Free School Dist.*, 407 N.Y.S. 2d 874 (1978). What this concern ignores, however, is the likelihood of success in these cases. Both the *Peter W.* and *Donohue* cases were dismissed and, with the reversal of the *Hoffman* case, *no educational malpractice case has ever been won.* On the other hand, plaintiffs have prevailed in the only case deciding the major issues raised by withholding a diploma on the basis of a functional literacy test (see Footnotes 2-12, *Footnotes*, November 1979, for a detailed summary of the *Debra P.* case). Therefore the likelihood of a successful diploma denial challenge based on a competency test is much greater than a successful educational malpractice challenge.

This is not to predict, however, that educational malpractice cases will disappear. The *Peter W.* challenge received national publicity and continues to be widely discussed by parents, lawyers and educators. Perhaps more important is the fact that *one of the rationales* for the *Peter W.* dismissal was the subjective nature of the relevant education standards. See 60 Cal. App. 3d at 824-25. A similar

rationale provided the basis for a Supreme Court refusal to question professional academic evaluations of a student by school officials. See *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 89-90 (1978).

Competency testing programs, with their relatively objective measures of competence, may have inadvertently strengthened the educational malpractice claim. Unlike the education programs involved in *Peter W.* and *Horowitz* (see discussion at 474 F. Supp. 265-66), competency testing programs attempt to set clearly specified standards: explicit education goals, performance objectives related to those goals, test specifications designed to measure those objectives, test items keyed to those specifications, and finally the crucial determination of a cut-score separating those deemed to be competent from those deemed to be incompetent. Whether such standards would strengthen some educational malpractice claims sufficiently to prevail remains an open question.

19 On October 16, 1979, a federal district court handed down an opinion in *Larry P. v. Riles*, No. C71-2270 RFP (N.D. Cal, decision 10/16/79) holding that California school officials unlawfully discriminated against black children by using racially and culturally biased intelligence quotient (IQ) tests to classify and place them in classes for the educable mentally retarded (EMR). Judge Robert F. Peckham provides the following summary of his 131-page opinion.

> This court finds in favor of plaintiffs, the class of black children who have been or in the future will be wrongly placed or maintained in special classes for the educable mentally retarded, on plaintiffs' statutory and state and federal constitutional claims. In violation of Title VI of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Education for All Handicapped Children Act of 1975, defendants have utilized standardized intelligence tests that are racially and culturally biased, have a discriminatory impact against black children, and have not been validated for the purpose of essentially permanent placements of black children into educationally dead-end, isolated, and stigmatizing classes for the so-called educable mentally retarded. Further, these federal laws have been violated by defendants' general use of placement mechanisms that, taken together, have not been validated and result in a large overrepresentation of black children in the special E.M.R. classes.
>
> Defendants' conduct additionally has violated both state and federal constitutional guarantees of the equal protection of the laws. The unjustified toleration of disproportionate enrollments of black children in E.M.R. classes, and the use of placement mechanisms, particularly the I.Q. tests, that perpetuate those disproportions, provide a sufficient basis for relief under the California Constitution. And under the federal Constitution, especially as interpreted by the Ninth Circuit Court of Appeals, it appears that the same result is dictated.
>
> Moreover, there is another basis for the federal constitutional ruling. Defendants' conduct, in connection with the history of I.Q. testing and special education in California, reveals an unlawful segregative intent. This intent was not necessarily to hurt black children, but it was an intent to assign a grossly disproportionate number of black children to the special E.M.R. classes, and it was manifested, *inter alia*, in the use of unvalidated and racially and culturally biased placement criteria. This intent, consistent only with an impermissible and unsupportable assumption of a higher incidence of mental retardation among blacks, cannot be allowed in the face of the constitutional prohibition of racial discrimination. (Slip Opinion, pp. 3-4.)

Relief granted to plaintiffs included (1) an injunction against defendants' use of standardized intelligence tests for EMR identification or placement without court approval; (2) an order that defendants monitor and eliminate disproportionate EMR placement of black children; and (3) reevaluation of all black children in EMR classes without use of such tests, and supplemental education assistance for all children found to have been misclassified.

This issue of *Footnotes* will summarize the court's analysis of IQ tests and test bias (Footnote 20), and federal statutory law and IQ test validation (Footnote 21). The next issue of *Footnotes* will continue this summary of the *Larry P.* case with footnotes on (1) the federal constitution and discriminatory intent, (2) injunctive relief and (3) defendants' appeal.

20 The trigger for the *Larry P.* Court's legal scrutiny of *IQ tests and test bias* was the disproportionate number of black children placed in EMR classes as a result of IQ tests and the serious injury of EMR placement to misclassified children. The court found that the EMR classes were "conceived of as 'dead-end classes' " for children incapable of learning the regular curriculum, and children in these classes tended to fall further and further behind children in regular classes since they are provided with instruction that deemphasizes academic skills in favor of adjustment (p. 18). Disproportionate numbers of black children had been placed in California's EMR classes. For example, the evidence showed that in the 20 districts accounting for 80 percent of the enrollment of black children in 1976-77, black students comprised about 27.5 percent of the student population and 62 percent of the EMR population (p. 23). This disproportion cannot be explained by chance since "there is less than a one in a million chance that the overenrollment of black children and the underenrollment of nonblack children in the E.M.R. classes in 1976-77 would have resulted under a color-blind system of placement" (p. 23).

Although California law required IQ test scores to be "substantiated by" other evidence such as adaptive behavior (the ability to engage in social activities and perform everyday tasks), the court found that the magic of numbers is strong and "[t]he available data suggest very strongly that, even if in some districts the I.Q. scores were not always determinative, they were pervasive in the placement process" (p. 33). "Moreover, the entire placement process revolves around the I.Q. determination" (p. 33).

In an introductory discussion of intelligence tests subtitled "The Impossibility of Measuring Intelligence," Judge Peckham noted that the expert testimony overwhelmingly rejected the conception of IQ as an objective measure of innate, fixed intelligence. "Defendants' expert witnesses, even those closely affiliated with the companies that devise and distribute the standardized intelligence tests, agreed, with one exception, that we cannot truly define, much less measure, intelligence. . . . I.Q. tests, like other ability tests, essentially measure achievement in skills covered by the examinations" (pp. 37-38). The fact that IQ tests "are developed according to the plausible but unproven assumption that intelligence is distributed in the population in accordance with a normal statistical curve . . . cautions us to look very carefully at what the tests do measure and exactly how they were validated for determining mental retardation" (p. 39).

Noting that the disparities in EMR placement of black children are also reflected historically in black performance in general on standardized intelligence tests, Judge Peckham examined three arguments used to explain the disparity in IQ scores: (1) the genetic argument, (2) the socioeconomic argument and (3) cultural bias. Judge Peckham rejected the kind of genetic argument expounded by Professor Jensen because "defendants were unwilling to admit any reliance on it for policy-making purposes" (p. 42) and because "[t]he rather weak evidence on record in support of the genetic explanation tends to rest on the disparities in the I.Q. scores, which obviously overlooks any possible bias in the tests themselves" (p. 43). Judge Peckham also rejected the socioeconomic argument, relied on by defendants, in large part because of testimony and studies showing that "[t]he relatively low scores of black children do not result from mental disease attributable to the physical risks of poverty even if school performance, as opposed to mental retardation, does vary somewhat according to socio-economic status" (p. 44). The socioeconomic argument also "fails to explain adequately why more severe mental retardation, such as that consistent with placement into classes for the 'trainable mentally retarded' children, also does not occur in greater proportions among the poorer sectors of the population, particularly among blacks" (p. 44).

On the other hand Judge Peckham found plaintiffs' evidence of racial and cultural bias in the IQ tests more persuasive. "The first important inferential evidence is that the tests were never designed to eliminate cultural biases against black children; it was assumed in effect that black children were less 'intelligent' than whites" (p. 45). He later noted: "The tests had been adjusted, for example, to eliminate differences in the average scores between the sexes, but a comparable effort was not made and has never been made for black and white children" (p. 68).

The court also found that Wechsler's admission in 1944 that the WISC's "standardization is based upon white subjects only" and that "our norms cannot be used for the colored population of the United States" apply with equal force to other standardized tests (p. 45). These problems were not solved by the restandardization of the Stanford-Binet and WISC-R intelligence tests in the 1970s which included black children in the same proportions that they were represented in the population at large. "The problem with these efforts is that

they did not address the main point of Wechsler's statement. Mixing the populations without more does not eliminate any preexisting bias" (p. 46). The court goes on to review "a number of indicators [that] point to the existence of a cultural bias against black chidren" (p. 48), including vocabulary and other linguistic differences, obvious biased items such as the notorious WISC "fight item," and more subtle kinds of bias involved in measuring knowledge of white culture (pp. 46-48). With only one exception (Professor Gordon), "there was general agreement by all sides on the inevitable effect of cultural differences on IQ scores. Put succinctly by Professor Hilliard, black people have a 'cultural heritage that represents an experience pool which is never used' or tested by the standardized IQ tests" (p. 48).

21 In analyzing the requirements of federal statutory law, the *Larry P.* Court set *legal standards for validation of IQ tests* used for EMR placement. Reviewing Title VI of the Civil Rights Act of 1964, the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975 (EHA), and related case law, Judge Peckham concludes that the three part test used in Title VII employment test cases is generally appropriate for allocating burden of proof for "validation" in the present case. Under this three part test, tests shown to have a discriminatory impact cannot be utilized unless the employer meets "the burden of showing that any given requirement has a manifest relationship to the employment in question" (p. 65). Judge Peckham notes, however, that the notion of predicting "job performance" cannot be effectively translated into the educational context given the different purposes of employers and schools:

> Compulsory attendance of educational institutions is required by the state, and the schools are supposed to take children from different backgrounds and teach them the skills necessary for adaptation and success in our society. This points out a fundamental difference between the use of tests in employment and education, at least in the early years of schooling. If tests can predict that a person is going to be a poor employee, the employer can legitimately deny that person a job, but if tests suggest that a young child is probably going to be a poor student, the school cannot on that basis alone deny that child the opportunity to improve and develop the academic skills necessary to success in our society. Assignment to E.M.R. classes denies that opportunity through relegation to a markedly inferior, essentially dead-end, track (p. 66).

Given this important distinction and federal regulations under EHA and the Rehabilitation Act requiring that tests and other evaluation materials be "validated for the specific purpose for which they are used," Judge Peckham replaces the predictive validity required in employment cases with an alternative kind of validation:

> We are not concerned now with predictions of performance, but rather whether the tests are validated with respect to the characteristics consistent with E.M.R. status and placement in E.M.R. classes. E.M.R. classes exist . . . "for people whose mental capabilities make it impossible for them to profit from the regular educational program." "Mental retardation" is the touchstone, and retardation must make it "impossible" to profit from the regular classes, even with remedial instruction. Defendants have the burden of showing validation of intelligence tests with respect to these characteristics (p. 67).

The court then turned to the expert testimony, noting agreement that IQ tests cannot measure innate intelligence but disagreement on whether the tests can measure the "mental ability" of children. Recognizing the controversy about whether that distinction makes conceptual sense, the court decided to "assume that the tests can accurately measure the mental ability of white children placed in E.M.R. classes, and ask if the tests as utilized for E.M.R. placement have been validated for black children" (p. 67). Since "validation has been assumed, not established, for blacks" (p. 67), the court held that defendants had not met their validation burden.

Even if the defendants had met this burden, the court stated that plaintiffs would still prevail since they had met their burden under the three part test of showing that alternative devices for placement exist and would serve defendants' legitimate interests without the same discriminatory effect. The primary evidence for this finding was the experience in California since 1975 when the court imposed a statewide moritorium on IQ testing for EMR placement. See *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972) *aff'd per curiam*, 504 F.2d 963 (9 Cir. 1974). The court found that subsequent evaluations were less discriminatory, using a wide number of factors including "more thorough assessments of the child's personal history and development, adaptive behavior both inside and outside the school environment, and classroom performance and

academic achievement" (pp. 73-74). The court cautioned, however, that "[l]ess discriminatory alternatives have been developed, but they have apparently not been validated, and they are still producing intolerable disproportions in E.M.R. classes. If E.M.R. classes are to continue in their present form, the state will have to make a better effort" (p. 74).

Judge Peckham distinguishes between the purposes of education and employment to explain why predictive validity is inappropriate in this education case (including the "self-fulfilling prophecy" of placing children with lower IQ scores in EMR classes [p. 66]), but he discusses predictive validity because "[d]efendants' defense of I.Q. testing relied considerably on the assertion that the predictive validity of the tests could be established" (p. 70). Lamenting "the paucity of probative studies in this area," Judge Peckham finds few validation studies on point because most of them (1) were not designed to determine predictive validity of IQ tests for *black* elementary school children, or (2) correlate IQ scores with scores on achievement tests rather than grades (p. 70). Noting plaintiffs' objections that "measurements of achievement 'autocorrelate' with I.Q. tests, since they are based essentially on the same pool of test items, and that they do not accurately measure the classroom performance of black children," the court agreed that "adequate correlations with grades must be required" because grades "*are* the accepted measure of school performance" (pp. 70-71).

> The key finding of these studies of grade predictions is not the extent of the correlations between I.Q. test scores and school performance (although the correlations are not great), but rather that the I.Q. tests are differentially valid for black and white children. . . . Differential validity means that more errors will be made for black children than whites, and that is unacceptable (pp. 71-72).

Therefore the court concludes: "Even if predictive validity could form the basis of validation for E.M.R. diagnosis and placement, defendants would still be unable to prevail" (p. 72).

22 The ECS Law and Education Center (LEC) will hold a *Preventive Law and Competency Testing Seminar* in Denver on Thursday, March 20, 1980. This seminar will be primarily for the 16 states that have competency testing programs that are used as a prerequisite to a high school diploma. The seminar will focus on preventive steps that some states may be able to take to avoid or minimize the kind of litigation that resulted in a four-year injunction against the Florida competency testing program (as detailed in the first issue of *Footnotes*). Presentations will be made by Chris Pipho, associate director, ECS Department of Research and Information; David Gordon, assistant chief, Office of Program Evaluation and Research, California Department of Education; and Merle McClung, LEC Director.

LEC has invited the commissioner of education in each of these 16 states to send two representatives, preferably their legal counsel and a key policy person responsible for their state's competency testing program. Other invitees include the chairpersons of the House and Senate Education Committees in each state. The seminar will also be open on a space-available basis to states and districts that are *considering* diploma-based competency testing programs. Their representatives can apply by completing the following form. The seminar is scheduled for one day, but the following day (Friday, March 21) will be kept open for consultation with representatives from individual states on a request basis.

Chris Char, Secretary/Admin. Asst.
Law and Education Center
Education Commission of the States
1860 Lincoln Street, Suite 300
Denver, CO 80295

Dear Ms. Char:

I would like to attend your Preventive Law and Competency Testing Seminar in Denver on March 20.

I represent _____.

We are ____ are not ____ considering a diploma-based competency testing program. Please let me know at your earliest convenience if space will be available.

_____
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_____
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